

SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1226

ROYCE AND MAMIE McBETH,
Petitioners

versus

UNITED PRESS INTERNATIONAL, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Sessions, Fishman,
Rosenson, Snellings
& Boisfontaine
Robert E. Winn
2100 Bank of New Orleans
Building
1010 Common Street
New Orleans, Louisiana
70112

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United Press International, Inc. respondent herein, respectfully prays that the application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 30, 1974 be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 505 F. 2d 959 and is accurately printed at Appendix "A" to the Petition.

A copy of the judgment and mandate is accurately printed at Appendix "B" to the Petition.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Petitioners' statement of questions presented for review is not completely accurate, and is more properly stated as follows:

(1) Whether the Court of Appeal for the Fifth Circuit was justified in affirming the district court's summary

dismissal of plaintiff- petitioners' action, because of plaintiffs-petitioners' failure to even allege one of the essential elements of defamation under Louisiana law, i.e., malice.

(2) Whether the Court of Appeal for the Fifth Circuit was justified in affirming the district court's summary dismissal of plaintiffs-petitioners' action because under Louisiana law that action was personal to the deceased and could therefore not be brought by plaintiffs-petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED

This action presents absolutely no Constitutional issues or federal questions and involves purely the interpretation of Louisiana law.

STATEMENT OF THE CASE

On November 29, 1972 United Press

International, Inc., hereinafter referred to as U.P.I., published on its wire service a story covering the fire that had engulfed the Rault Center in New Orleans, Louisiana. That article contained an inadvertent clerical error in the form of a statement that Jannas McBeth, one of the women who jumped to her death from the Rault Center, was seven months pregnant at the time of said fire and her death. In fact she was neither pregnant nor married. She had been married, but was single at the time of the fire and her death, and was survived by a 14 year old son. This diversity suit was brought on behalf of both her minor son and her estate. The District Court granted UPI's motion for summary judgment dismissing the case. On appeal, the Court of Appeals of the

Fifth Circuit affirmed the District Court, and held as follows:

(1) That under Louisiana law, a defamation action does not survive the decedent's estate;

(2) That the complaint was properly dismissed from the District Court for failure to allege malice;

(3) That the action was properly dismissed in the District Court as to the minor son because the tort action of defamation was personal to the party defamed.

ARGUMENT

Petitioners raise two contentions in support of their application for certiorari, both relating solely to an interpretation of Louisiana law. Because no Constitutional issues or federal questions are presented, and because no other unusual or significant issues are present herein, the application for certiorari must be denied.

I.

Petitioners first contend that the Court of Appeal for the Fifth Circuit erred in finding that the failure to allege malice in the complaint justified dismissal of the action. Under Louisiana law the allegation of malice (and proof thereof) is one of the elements necessary to even state a cause of action for defamation. Because failure to even allege that element would preclude the introduction of evidence thereon, the Court of Appeal properly affirmed the district court's summary of the action. The question of what elements a state might require of a plaintiff in order to present an actionable cause in defamation has no Constitutional or federal ramifications whatsoever; indeed if a state chose to not even recognize

an action in defamation no federal issue would be raised. Petitioners quite simply failed to even allege the presence of one of the prerequisites necessary to maintain their action, and dismissal was clearly mandated.

This case does not involve a mere failure to allege sufficient factual information to satisfy the "fact pleading" system utilized in Louisiana; it is the more basic failure to even allege that one of the essential elements of a cause of action in defamation is present. For that reason alone the action taken by the Fifth Circuit was completely proper.

II.

As completely separate, independent and wholly-sufficient grounds for affirming the district court's summary dis-

missal of this action, the Court of Appeal for the Fifth Circuit also found that Louisiana law would not permit a defamation action to be brought on behalf of any person or entity other than the person actually defamed, since that action would be strictly personal to the party allegedly injured by the publication. Thus, even if the publication in question were defamatory, which it was not, no action would lie.

It is black letter law that the alleged defamation of a deceased creates no civil action whatsoever. The editors of C.J.S. state that the

> "maligning of the memory of a deceased person does not give rise to a cause of action for damages in favor of his relatives where it does not affect their reputation."
>
> 53 C.J.S. Libel and Slander, §11 at page 53.

Professor Prosser observes:

> "Any living person may be defamed. The civil action is personal to the plaintiff, and cannot be founded on the defamation of another. . . Likewise, no civil action will lie for the defamation of one who is dead, unless there is a reflection upon those still living, who are themselves defamed. Statutes in several states have made defamation of the dead a crime, but they are construed to create no civil action." (Emphasis added)
>
> Prosser on Torts, §92 at page 578 (2d ed. 1955).

Harper & James specifically declares that

> "only a living person can be defamed. While the memory of the dead may be desecrated and this may amount to a crime, there can be no defamation of the dead under the common law principles of defamation." (emphasis added)
>
> 1 Harper & James, The Law of Torts, §5.3 at page 361 (1956).

And the Restatement of Torts recites:

> "One who falsely, and without a privilege to do so, publishes

> defamatory matter of a deceased person is not liable either to the estate of such person or to his descendants or relatives." Restatement of Torts, §560.

See also the legion cases collected in 132 ALR 891, 892 disallowing civil defamation actions by surviving family members of the person allegedly defamed.

The law of Louisiana is completely in accord with the foregoing principles, as was demonstrated at great length by respondent herein to, and as was fully considered by, the Court of Appeal for the Fifth Circuit, and any dispute to the contrary that petitioners might have would be directed solely to that Court's interpretation of state law, not to any Constitutional or other federal question.

CONCLUSION

For the reasons stated above,

Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Sessions, Fishman, Rosenson, Snellings & Boisfontaine
Robert E. Winn
(Trial Attorney)
2100 Bank of New Orleans Building
1010 Common Street
New Orleans, Louisiana 70112
Telephone: 504-581-5055

BY_____
ROBERT E. WINN
ATTORNEYS FOR RESPONDENT, UNITED PRESS INTERNATIONAL, INC.

PROOF OF SERVICE

I, Robert E, Winn, attorney for respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing brief in opposition to petition for certiorari on:

Donald V. Organ
427 Gravier Street
New Orleans, Louisiana 70130

_____
ROBERT E. WINN

April _____, 1975.